

# Lockerbie trial in the Netherlands

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Judge Preska found that "the facts clearly show that Toft was willfully blind to the suspicious nature of the manuscript transaction."<sup>2</sup>

Judge Preska's decision explains that the manuscript was acquired in 1992 at a Mexico City flea market for about \$300 by Duane Douglas, a Mexico City book, coin, and manuscript dealer. The following year Douglas took the manuscript to the U.S. without declaring it to Customs officials. He kept it in a safe in his daughter's home in Los Angeles.

Toft testified that in 1996 the dealer told him he had acquired the document from a private collection in Mexico that had been divided in the early 1970s.

Toft paid \$16,000 for the manuscript. In June 1996, he consigned it to Sotheby's for auction at an estimate price of \$20,000 to \$30,000. The manuscript did not meet its minimum bid at auction and remained at Sotheby's on consignment for private sale.

A Los Angeles dealer notified the Mexican National Archives of the manuscript's location after he saw it in a Sotheby's catalogue. Thereafter, the Mexican Government requested action under the treaty.<sup>3</sup> The successful use of the convention to return cultural property to Mexico indicates a success story of the convention and cooperation in this field between the U.S. and Mexico.

## XII. TERRORISM

### A. Lockerbie Trial in the Netherlands

by André Klip<sup>\*</sup>

The United Kingdom and The Netherlands concluded an agreement concerning a Scottish trial in The Netherlands on September 18, 1998.<sup>1</sup> It is the result of a compromise related to the bombing of Pan American World Airways flight 103 over Lockerbie, Scotland on 12 December 1988. It is unclear why the United States, which supports the agreement in a joint letter with the United Kingdom to the Security Council, has not become a party. The result is that, if it would come to the trial, the United States will not be bound by the eventual outcome. The Security Council has supported the initiative in its Resolution 1192 (1998) adopted at its 3920<sup>th</sup> meeting, on 27 August 1998.

Two Libyan nationals, Abdelbaset Ali Mohamed Al Megrahi and Al Amin Khalifa Fhimah are accused by the Scottish Procurator Fiscal to having committed the bombing. In its resolution 748 (1992) and 883 (1993), the Security Council of the United Nations demanded Libya to ensure the presence of the two for trial in the Netherlands before a Scottish court.

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2 *Id.*

3 *Id.* For a discussion of the recovery and return of stolen cultural property between Mexico and the U.S., see Bruce Zagaris and Leslie S. Potter, *Toward a Common U.S.-Mexican Cultural Heritage: The Need for a Regional Americas Initiative in the Recovery and Return of Stolen Cultural Property*, 5 THE TRANSNATIONAL LAWYER 627-90 (Fall 1992).

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1 Published in Treaty Series of the Kingdom of The Netherlands 1998, 237.



The agreement is modeled after other examples of host country agreement, such as between the United Nations and The Netherlands concerning the International Criminal Tribunal for the Former Yugoslavia. It regulates the sitting of the Scottish Court in The Netherlands and the matters arising out of the trial and the proper functioning of the Scottish Court (art.2).

The jurisdiction of the Scottish Court is limited to the trial which includes any preliminary proceedings, investigative steps, preparations for the trial, preliminary hearings and appeals following service of the indictment, any determination of law or fact and the imposition of penal sanctions, and any appeal by the accused following conviction, all in accordance with Scots law and practice. On one point, the agreement deviates from the regularly applicable law in Scotland. A jury trial will only take place on specific request and consent of both accused. The Agreement allows for the detention of the accused for the purposes of the trial. The Scottish Court may also order the temporary detention of witnesses as well as of persons found in contempt of court.

The premises of the Scottish Court shall be inviolable stipulates articles 5 of the Agreement. The Scottish Court shall have full authority within its premises. No law or regulation of the host country, which is inconsistent with a regulation of the Scottish Court shall be taken care of by the authorities of the host state. It is their task "to ensure that the tranquility of the Scottish Court is not disturbed by the intrusion of persons or groups of persons from outside the premises or by disturbance in their immediate vicinity."

The Scottish Court shall be immune, exempted from taxes and duties and receive protection on the level accorded to diplomatic missions. Article 11 stipulates that The Netherlands shall not intervene in any correspondence of the Scottish Court. It shall have the right to publish freely and without any restrictions within the host country. The judges and officials of the Scottish Court enjoy diplomatic immunity (art.14). Solicitors and advocates shall not be subjected by the host country to any measure which may affect the free and independent exercise of their functions under Scots law (art. 15).

Article 16 deals with the accused. It stipulates that "at the time of the arrival of the accused in the host country, the Government of the United Kingdom shall, in accordance with the relevant treaties. Request the Government to transfer the accused to the premises of the Scottish Court." This means that The Netherlands will have to extradite the accused to the Scottish Court on the Basis of the Anglo-Dutch treaties. These are the European Convention on Extradition and its two Protocols, as well as European Union conventions on extradition that might have entered into force at the moment of the Scottish extradition request. In addition to that the provisions of the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation for the predicate offences will apply. From the Explanatory Memorandum of The Netherlands Government to the ratification act it is clear that it is intended to follow an extradition procedure before a district court. It is rather strange that extradition procedures are planned to be followed since article 1 of the Extradition Act defines extradition as follows: "the removal of a person from The Netherlands with the object of surrendering him to the authorities of another State for the purpose of a criminal investigation concerning him in the State or of enforcing a penalty or measure imposed on him in that State."<sup>2</sup> There seems to be no other conclusion than that it has been overlooked that this is not a removal from the Netherlands. To the contrary, the whole purpose of the treaty is that the accused shall remain within The Netherlands for trial. In the Dutch implementation Act to the Statute of the Yugoslav Tribunal this problem has been prevented by giving a definition of extradition which deviates from the general extradition act: "placing a person at the Tribunal's disposal (...)". A similar definition should be adopted in the Lockerbie Implementation Act in order to make the Dutch Extradition Act applicable. Another issue that deserves attention is how the two accused arrive in The Netherlands. Depending on the legal basis for their appearance, this might give them unexpected legal remedies.

It is provided in Article 16, paragraph 2, that the two accused shall be transferred to the United Kingdom in



two situations only: a) for the purpose of trial by jury in Scotland, provided that the accused have given their written agreement, and have confirmed that agreement in person to the High Court of Justiciary in the presence of any counsel instructed by them, or: b) for the purpose of serving a custodial sentence imposed by the Scottish Court following the conviction of the accused. It seems that the Libyan government has strong objections to any possibility of a transfer to the United Kingdom and that therefore the two accused have not yet been sent to The Netherlands. In the last week of February, United States and United Kingdom officials were quoted in the press to say that Libya has one month left to secure the presence of the two in The Netherlands.

Paragraph 3 of Article 16 forms an immunity for the accused under Dutch law. The host country shall not exercise its criminal jurisdiction over the accused over the events over Lockerbie and possible other crimes committed before arrival in the host country. Paragraph 4 contains the obligation for the accused to leave The Netherlands whenever the trial is being discontinued by process of law preventing any further trial under Scots law or on their acquittal.

The host country is under the obligation to permit the entry into The Netherlands of witnesses (art.17). It shall protect them and might assist in transfers of these persons. All witnesses enjoy a temporary safe conduct while being in The Netherlands for the purpose of giving testimony at the trial.

Article 24 stipulates that all costs related to the establishment and sitting of the Scottish Court in the Netherlands as well as the costs of the host country related thereto shall be borne by the Government of the United Kingdom.

In order to make the treaty operative, The Netherlands Government adopted an Act to implement the Obligations. The full title of the act is Act of November 11, containing provisions relating to the establishment of a Scottish Court for the prosecutions of the persons, indicated as "the two accused" in resolution 1192 (1998) adopted by the Security Council of the United Nations at its 3920<sup>th</sup> meeting on 27 August 1998, concerning the criminal offences, as meant in the preamble of the host country agreement between the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands of 18 September 1998 concerning the establishment of a Scottish Court sitting in the Netherlands.

The act contains three articles only. Article 1 ratifies the agreement with the United Kingdom. Article 2 declares Dutch law inapplicable for the trial. It reads: "Dutch law shall not apply to deprivation of liberty ordered by the Scottish Court sitting in the Netherlands for the prosecutions of the persons accused of the criminal offences, as meant in the host country agreement between the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands of 18 September 1998 in premises used by that Court in the Netherlands." Article 3 regulates that the act entered into force on 14 November 1998.

The way article 2 is formulated leaves room for the application of Dutch law on all other persons than the two accused, such as witnesses and experts. The offences these persons might commit, perjury or contempt of court might thus also fall under Dutch law, where it is clear from the agreement itself that this was not intended (art. 17).

This bilateral treaty is a new step in international cooperation in criminal matters. It shows that a traveling court can operate while respecting the sovereignty of the other state. Like the transfer of proceedings and the transfer of executions of judgments, it forms an alternative to the more traditional forms of cooperation, such as extradition and mutual legal assistance.

## **B. Libya Announces Hand Over of Suspects by April 6**

On March 19, 1999, Libya officially told the United Nations it will hand over by April 6, 1999 two